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No. _____

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DAVID STOCK,

Petitioner,

V.

UNIVERSAL FOODS CORPORATION; DENNIS W. CASSIDY; KENNETH RANDALL; RONALD C. MILLER,

Respondents.

On Petition for Writ of Certiorari from the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED

I. WHETHER UNIVERSAL FOODS CORPORATION IMPLEMENTATION OF ITS AFFIRMATIVE ACTION PLAN TRAMMELS THE RIGHTS OF THE MAJORITY IN VIOLATION OF 42 U.S.C. § 1981

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

David Stock, Petitioner

v.

Universal Foods Corporation; Dennis W. Cassidy;
Kenneth Randall; Ronald C. Miller, Respondents

ON PETITION FOR WRIT OF CERTIORARI
From the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

David Stock, the Petitioner herein, prays that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled case on February 17, 1994.

Opinions Below

The Order of the United States District Court for the District of Maryland granted the Respondents' Motion for Summary Judgment. Petitioner filed a timely appeal to the United States Court of Appeals for the Fourth Circuit claiming that Respondents' implementation of its affirmative action plan trammeled the rights of the majority (caucasians) in violation of 42 U.S.C. § 1981 and that the District Court erred when it found that petitioner must prove that he is a member of a class which has historically suffered pervasive discrimination in order to establish a *prima facie* case under 42 U.S.C § 1985(3). On January 19, 1994, the United States Court of Appeals for the Fourth Circuit, in an unpublished *per curium* opinion, affirmed the District Court's opinion in all aspects and is printed in the Appendix A, hereto, infra pp. A-16 through A-30.

Jurisdiction

The United States Court of Appeals for the Fourth Circuit rendered its opinion (*infra,* pp. A-16 through A-30) on January 19, 1994. A timely Petition for Rehearing was filed. On February 17, 1994, the Fourth Circuit issued its opinion denying the Petition for Rehearing. Accordingly, the jurisdiction of the Supreme Court is invoked pursuant to United States Code Title 28, § 1257 (1).

The jurisdiction of this Court is invoked on the ground that for all practical purposes, the District Court and the Fourth Circuit Court of Appeals appear to have taken the position that there is no cause of action under 42 U.S.C § 1981 for "reverse discrimination."

Statutory Provisions Involved

42 U.S.C § 1981 provides in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State...to make and enforce contracts, to sue, be parties, give evidence, and to the

> full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

42 U.S.C. § 1985(3) provides in relevant part:

> Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws;...in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Statement of the Case

- Procedural History:

On February 27, 1992, David Stock, Petitioner, filed suit against Universal Foods Corporation and three of its employees, Kenneth Randall, Dennis W. Cassidy, and Ronald C. Miller, alleging "reverse discrimination" in denying him employment at Universal Foods Corporation thus violating the rights secured to Petitioner by the Civil Rights Act of 1871, 42 U.S.C. § 1981. Moreover, Petitioner alleged, that Cassidy, Randall, and Miller conspired, in violation of 42 U.S.C. § 1985(3), to deprive Petitioner of his right to make and enforce contracts, as is guaranteed to all citizens of the United States.

On April 1, 1992, a lengthy Motion to Dismiss complete with Affidavits as well as other exhibits was filed by the Respondents.

On April 20, 1992, Petitioner filed a Response to Respondents' Motion to Dismiss.

On July 24, 1992, by Order of the Honorable Benson Everett Legg, Respondents' Motion to Dismiss was converted to one for Summary Judgment under Federal Rule 56.

On August 24, 1992, Petitioner filed a Response to Respondents Motion for Summary Judgment as wells as his own Motion for Summary Judgment.

On August 31, 1992, the Respondents filed a Supplementary Memorandum in support of their Motion for Summary Judgment. Additionally, on September 11, 1992, Petitioner filed a Response to the Respondents Supplementary Memorandum.

On March 31, 1992, absent any hearing, the Honorable Benson Everett Legg filed a Memorandum and Order dismissing Petitioner's Complaint.

An Appeal of Judge Legg's decision was timely filed on April 13, 1993, to the United States Court of Appeals for the Fourth Circuit. No oral argument was requested by the Appellate Court. On January 19, 1994, the Fourth Circuit Court of Appeals affirmed the trial court's order by its unpublished, *per curiam* opinion.

A timely Petition for Rehearing with Suggestion for Rehearing in Banc was filed by Petitioner. The Petition and Suggestion were denied on February 17, 1994.

Both the District Court and the Fourth Circuit ignored the fact that an independent witness, Preston Sealover, testified at his deposition that the Respondents were in fact seeking a journeyman machinist to fill an open position. The Fourth Circuit ignored this testimony on the basis that it was "hearsay" and instead chose to believe the self serving testimony of the Respondents to

the effect that being a journeyman machinist was not a requirement for the job. The lower courts also ignored other evidence which seemed to support Petitioner's contention as to the job requirement. When Miller reviewed the thirty two applications submitted, he chose only to interview the five applicants who were journeyman machinists.

The ultimate hiree, an African American, was not a journeyman machinist. In light of there being in place a *bona fide* plan of affirmative action, petitioner's entire case rests upon the singular fact that the job requirement was waived so that an unqualified minority could be hired.

Statement of Facts:

The following pertinent facts were alleged in the Petitioner's Complaint:

During the last week of August or the first week of September, 1991, Robert Smith quit his position at

Universal Food's maintenance shop. Ronald Miller, the maintenance shop supervisor, communicated to the people in the shop that he desired to replace Smith with a journeyman machinist. (A journeyman machinist is a machinist who has successfully taken 4 years of academic courses and worked 4 years as an apprentice machinist prior to certification as a journeyman).

In the past, the Respondent, Ronald Miller (Miller), had hired people were are employed in the maintenance shop. The last two employees hired prior to the events giving rise to Petitioner's Complaint were hired by Miller.

Having been advised of the opening by one of the employees in the shop, Charles Preston Sealover, Petitioner appeared for an interview with Miller. After the interview, Miller advised the Petitioner that he was impressed with Petitioner's qualifications. A second

interview was arranged for September 10, 1991, with Allan Brethauer the Plant Engineer.

Petitioner is a "tool and dye maker." A tool and dye maker is a journeyman machinist who has taken an additional two years of academic training and worked another several years as an apprentice. A tool and dye maker is considered by the trade the be the elite of machinist's.

After the interview by Brethauer and a private discussion between Miller and Brethauer, Miller approached Petitioner and said "everything looks good." Miller started to arrange for a pre-employment physical examination for the Petitioner.

At that point Respondent Dennis Cassidy (Cassidy), the Assistant Plant Manager and Equal Employment Opportunity (EEO) Coordinator, told Miller that he wished to speak to him privately. After a brief conversation with

Cassidy, Miller advised Petitioner, "we've hit a slight snag...to keep from being charged by the EEOC, we have to go through the motions and run an ad for the machinist position...but don't worry, the only way you won't get the job is if someone comes in here and knocks my eyes out with better qualifications than yours - but that would be hard to come by."

On September 14 and 15, 1991, Universal placed an advertisement in the Baltimore Sun newspaper for a "machinist/mechanic" position. Testimony revealed that the ad was not tailored for this particular opening, but that the exact ad had been used in the past.

On or about September 23, 1991, Miller called the Petitioner's boss Donald Scaggs at American National Can Corporation for an evaluation of the Petitioner's work. Mr. Scaggs responded that on a scale of one to ten he would rate the Petitioner an eleven.

As a result of the advertisement that was placed in the Baltimore Sun a field of approximately 32 men applied for the position. The only five journeyman machinist applicants were chosen for interview. Among the five was Petitioner. Mr. Tyrone Anderson, the ultimate hiree, was not a journeyman machinist, not qualified for this particular opening, and thus was not selected for an interview. Of the five interviewees, three were tool and dye makers. After interviewing the finalists, Petitioner was told by Miller that he was still his choice for the position.

Miller made it known to Petitioner and to other workers in the Universal maintenance shop that Petitioner was the most highly qualified applicant, and that he would be starting work very soon.

After the Petitioner was again told that he was selected for the job, Miller was ordered or it was "strongly

suggested" to him by Cassidy and Randall to search through the applications in order to find a black or minority applicant to interview.

The applications did not indicate race, religion, ethnicity, etc. Miller looked through the rejected applications and picked two non-qualified applicants whom he believed were probably black.

One was chosen because he worked at Park Sausage, a well known black owned company in Baltimore. The second was chosen because his first name was Tyrone. Only Tyrone was interviewed, and only Tyrone was hired, notwithstanding his lacking the essential requirement for the journeyman machinist position - he was not a journeyman machinist. He was hired strictly on the basis of his race.

Miller, Cassidy and Randall were admittedly employees of Universal Foods Corporation at the time of

this incident and the hiring of personnel was within the scope of Cassidy's, Randall's and Miller's employment at Universal.

To summarize the facts proven by deposition and/or documentary evidence, the following occurred:

1. Universal wanted to hire a journeyman machinist to work in its Red Star Yeast plant located in Dundalk, Maryland.

2. The corporation had recently put in place a lawful, *bona fide* affirmative action plan (AAP) at the Red Star plant as a result of past discriminatory practices.

3. The maintenance shop supervisor, Miller, not being aware of the requirements of the AAP, interviewed and began to hire Petitioner.

4. Pursuant to the AAP the machinist job was advertised, and the journeyman machinist applicants were contacted for interview.

5. After the interview process, Petitioner was advised that the job was his.

6. Randall and Cassidy "strongly suggested" that Miller find a minority applicant to interview.

7. The rejected applications were reviewed by Miller and he chose to call an applicant solely because his name was Tyrone, without regard to qualifications.

8. Tyrone Anderson was hired notwithstanding his lack of machinist training, experience and/or certification.

Reasons for Granting this Writ

Petitioner has demonstrated by the testimony of the only non-party, unbiased witness involved thus far that Ronald Miller had specifically asked his men (the employees in the shop) whether they knew of any journeyman machinists who may be interested in working for Universal. Secondly, after over 30 applications were received in response to the admittedly not-specific

newspaper advertisement, only five applications were chosen for interview by Miller. All five of those applicants were journeyman machinists.

The Court of Appeals for the Fourth Circuit addressed the issue as follows at page six of its opinion:

> In support of his claim that the job opening *required* a journeyman machinist, Stock noted (1) that Preston Sealover testified at his deposition that Miller told him that the job required a journeyman machinist, and (2) that after the job was advertised in the paper, Miller initially chose five papered machinists to interview. These "facts" do not create a material dispute preventing summary judgment. We note that Sealover's testimony was inadmissible hearsay and thus, was "not suitable grist for the summary judgment mill." Cites... Moreover, Miller stated under oath that being a journeyman machinist was *not* a requirement for the job and Randall, Miller's superior and the plant manager, corroborated that there was no such requirement. Therefore the district court correctly found that the undisputed evidence showed that the job opening did not require a journeyman machinist.

First of all, Sealover did not testify that Miller told him anything. His testimony was that he, and the other men in the shop, were approached by Miller and were asked if they knew of any journeyman machinists who may wish to fill the position. Petitioner could not imagine that for purposes of summary judgment he should have called all the people in the shop who heard Miller's statement. The Court does not reveal it thinking when it concluded that Sealover's testimony was "inadmissible hearsay". It is not.

(1) Miller is a Respondent and the statement is a party admission (F.R.E. 801(d)(2)(A)); (2) Even if Miller were not a party Respondent, he is part of management of the corporate party Respondent and the statements concern a matter within the scope of his employment made during the existence of his employment (F.R.E. 801(d)(2)(D); (3) the statement proffered is illustrative of Miller's state of

mind, and explains what he did, and why he did what he did (F.R.E. 803(3); and (4) perhaps most importantly, the statement constituted a verbal act, and not hearsay at all as defined in F.R.E. 801(c), in that it constituted Miller's first attempt at advertising.

Why the Fourth Circuit is so willing to accept the self-serving testimony of three defendants and discount the testimony of the only witness who has no stake in the outcome of this case is a matter for speculation. But that such handling is reversible, error is not.

The second matter of note about the Fourth Circuit's analysis is the fact that the Court does not at all address the highly probative, undisputed fact that Miller chose the only five journeyman machinists' applications for interview.

It appears that the Fourth Circuit Court of Appeals along with many other courts in this country are doing

their best to ignore, if not do away with, reverse discrimination cases. It appears that the Fourth Circuit created law in order to justify the pre-determined desired outcome.

In a Motion for Summary Judgment the facts have to be viewed in a light most favorable to the non-moving party. Petitioner believes that this standard applies in all cases, even those of reverse discrimination.

The only reason that Tyrone Anderson was interviewed was because of his first name. The only reason he was hired was his race.

It is important to note that Petitioner does not contend that the AAP was not required at Respondents' plant in light of past discriminatory practices, nor does Petitioner contend that the plan was not *bona fide* as written. Petitioner does contend, however, that implementation of the AAP by waiving the basic

requirement of a job in order to hire a non-qualified minority trammels the rights of the majority and makes a mockery of affirmative action.

All agree that an AAP is *bona fide* if it is substantially related to its remedial purpose. *Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). Furthermore an AAP is "substantially related to its remedial purpose" if it does not unnecessarily trammel the rights of the majority: *Lilly v. City of Beckley, West Virginia*, 797 F.2d 191, 194 relying on *United Steel Workers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L. Ed.2d 480 (1979). We stress and repeat Petitioner's view that it is not the Plan itself which unnecessarily trammels the majority's rights, but rather, Universal's method of implementation.

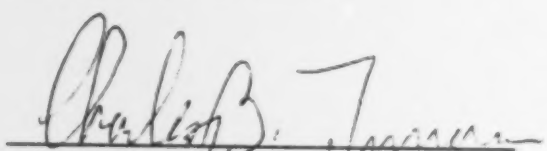
Either 42 U.S.C. § 1981 applies to the caucasian race as stated in *McDonald v. Sante Fe Transport*

Company, 427 U.S. 273 (1976) or it does not. The lower courts are bound by the Supreme Court ruling whether they like it or not, politically correct or not.

Conclusion

This case effects all of the country's inhabitants. We are all either part of a protected minority who have a right to special treatment if such is justified as a result of past discrimination, or we are part of the majority who have the absolute right not to have their interests and rights destroyed and ignored by one's arbitrary and capricious implementation of a plan of affirmative action.

Respectfully submitted,



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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DAVID STOCK
698 Benfield Road
Severna Park, Maryland 21146

Plaintiff

v.

UNIVERSAL FOODS CORPORATION
2100 Van Deman Street
Baltimore, Maryland 21224

Serve on Resident Agent:
Corporation Trust Incorporated
32 South Street
Baltimore, Maryland 21202

and

Case No.:

DENNIS W. CASSIDY
2100 Van Deman Street
Baltimore, Maryland 21224

and

KENNETH RANDALL
2100 Van Deman Street
Baltimore, Maryland 21224

RONALD C. MILLER
2100 Van Deman Street
Baltimore, Maryland 21224

Defendants

COMPLAINT AND DEMAND FOR JURY TRIAL

David Stock, Plaintiff, by and through his attorney Charles B. Zuravin, and Charles B. Zuravin, P.A., brings suit against Universal Foods Corporation, Dennis W. Cassidy, Kenneth Randall, and Ronald C. Miller, Defendants, and hereby states:

JURISDICTION

1. This Court has jurisdiction to try this case under the provisions of 28 U.S.C. §1331 to decide federal and constitutional questions raised hereunder.

VENUE

2. Venue in this case is properly before the United States District Court for the District of Maryland under the provisions of 28 U.S.C. §1391

(B) & (C).

INTRODUCTION

3. Universal Foods Corporation (Universal), Defendant, is a Wisconsin corporation which has been licensed to do business in Maryland since 1962. Universal is located at 2100 Van Deman Street, Baltimore, Maryland.

4. The Defendant, Ronald C. Miller (Miller), is employed by Universal, and was, at all relevant times hereto, the Maintenance Superintendent at the Van Deman Street Plant.

5. The Defendant, Dennis W. Cassidy (Cassidy), is employed by Universal, and was, at all relevant times hereto, the Assistant Plant Manager, and Equal Employment Opportunity (EEO) officer, at the Van Deman Street plant and the immediate supervisor of Miller.

6. The Defendant, Kenneth Randall (Randall), is employed by Universal, and was, at all relevant times hereto, the Plant Manager at the Van Deman Street plant and supervisor of both Cassidy and Miller.

7. The Plaintiff, David Stock, is a "tool and die maker."[1] The Plaintiff was employed as such at American National Can Corporation for 14 years. As of December 27, 1991, American National Can Corporation has closed its plant where Plaintiff was employed.

COMPLAINT

8. Sometime during the last week in August or the first week in September an employee named

---

1. It takes four years of training to become a journeyman machinist, and an additional year of training to become a Tool and Die Maker.

Robert Smith quit his position at Universal's maintenance shop.

9. In the past Miller had hired people who are employed in the maintenance shop. The last two employees hired prior to the events giving rise to this Complaint were hired by Miller.

10. Sometime in the first week of September, Miller communicated to the people in the maintenance shop that he desired to interview qualified persons for the open position.

11. On September 9, 1991, the Plaintiff was interviewed by Miller. Miller advised the Plaintiff that he was impressed with Plaintiff's qualifications. A second interview was arranged for September 10, 1991, with Allan Brethauer (Brethauer) the Plant Engineer.

12. On September 10, 1991, the Plaintiff was interviewed by Brethauer.

13. After the interview by Brethauer; Miller and Brethauer spoke privately while the Plaintiff waited in another room. Miller walked out and said "everything looks good." Miller started to arrange for the physical examination that the Plaintiff had to take as a pre-condition of employment.

14. At that point Cassidy walked over and told Miller that he wished to speak to him privately. After a brief conversation, Miller advised Plaintiff "We've hit a slight snag ... to keep from being "charged" by the EEOC, we have to go through the motions and run an ad for the machinist position....but don't worry, the only way you won't get this job is if someone comes in here and knocks my eyes out with better qualifications than yours -

but that would be hard to come by."

15. On September 14 and 15, 1991, Universal placed an advertisement in the Baltimore Sun newspaper for a machinist position.

16. On or about September 23, 1991, Miller called the Plaintiff's boss Donald Scaggs at American National Can Corporation for an evaluation of the Plaintiff's work. Mr. Scaggs responded that on a scale of one to ten he would rate the Plaintiff an eleven.

17. As a result of the advertisement that was placed in the Baltimore Sun a field of applicants applied for the position; subsequently, the most highly qualified five applicants were selected for interviews - none of whom were minorities.

18. After interviewing the available finalists, Plaintiff was told by Miller that he was still the

number one choice for the position.

19. Miller made it known to Plaintiff and to other workers at Universal that Plaintiff was the most highly qualified applicant and that he, Plaintiff, would be starting work very soon.

20. After the Plaintiff was told that he was hired, Miller was ordered by Cassidy and Randall to search through the applications in order to find black applicants to interview.

21. Miller looked through the applications and picked two of the applicants whom he believed were probably black. One was chosen because he worked at Parks Sausages, and the other because his first name was Tyrone.

22. The only minority person who appeared and was interviewed by Cassidy was Tyrone Anderson.

23. Although Tyrone Anderson had not served an apprenticeship, is not a journeyman machinist, much less a tool and die maker, and had no packaging experience at the time of his hiring, the machinists in the maintenance shop were told on October 24, 1991, that Tyrone Anderson had been hired. Tyrone Anderson began his employment at Universal on or about November 4, 1991.

24. Miller, Cassidy and Randall were the servants, agents, and/or employees of Universal at the time of this incident.

25. The hiring of personnel was within the scope of Cassidy's, Randall's, and Miller's employment at Universal.

26. The Defendants, Cassidy, Randall, Miller and Universal are jointly and severally liable for all damages arising out of this incident.

COUNT I

42 U.S.C § 1981

David Stock, Plaintiff, sues Universal Foods Corporation, Dennis W. Cassidy, Kenneth Randall, and Ronald C. Miller, Defendants, and in support thereof hereby states:

27. The factual allegations contained in paragraphs 1 through and including 26 are incorporated herein by reference as if fully restated herein.

28. This Count is a claim for legal and equitable remedies to redress the deprivation of rights secured to Plaintiff by the Civil Rights Act of 1871, 42 U.S.C. §1981, as amended by the Civil Rights Act of 1991, arising out of discriminatory practices by the Defendants to deprive the Plaintiff of his rights to make and enforce contracts, as is

guaranteed to all citizens of the United States.

29. Cassidy, Randall, and Miller acting within the scope of the their employment at Universal, refused to hire Plaintiff solely on the basis of his race.

WHEREFORE, Plaintiff requests relief as follows:

A. For economic damages including, but not limited to, loss of earnings, benefits, of employment including, sick leave, vacation leave, retirement benefits in the amount of one million five hundred thousand dollars ($1,500,000.00);

B. For compensatory damages for losses resulting from, humiliation, mental anguish, economic hardship, and other damages, in the amount of five hundred thousand dollars ($500,000.00);

C. For pre-judgment interest on the amount of lost earnings and other employment benefits, at the prevailing rate allowed by law;

D. For punitive damages in the amount of five million dollars ($5,000,000.00);

E. For attorneys fees in an amount to be determined at the end of this litigation;

F. For costs of this suit; and

G. For such other and further relief as the Court may deem proper.

COUNT II

42 U.S.C. §1985(3)

David Stock, Plaintiff, sues Universal Foods Corporation, Dennis W. Cassidy, Kenneth Randall, and Ronald C. Miller, Defendants, and in support thereof hereby states:

30. The factual allegations contained in paragraphs 1 through and including 26 are incorporated herein by reference as if fully restated herein.

31. This Count is a claim for legal and equitable remedies to redress the deprivation of rights secured to Plaintiff by 42 U.S.C. §1985(3), as amended by the Civil Rights Act of 1991, arising out of a conspiracy by Defendants Cassidy, Randall, and Miller to deprive Plaintiff of his right to make and enforce contracts, as is guaranteed to all citizens of the United States.

32. Cassidy, Randall, and Miller acting within the scope of their employment at Universal, joined together to act in concert to deprive Plaintiff of his basic right to earn a living in his chosen field solely on the basis of his race.

WHEREFORE, Plaintiff requests relief as follows:

A. For economic damages including, but not limited to, loss of earnings, benefits of employment including sick leave, vacation leave in the amount of one million five hundred thousand dollars ($1,500,000.00);

B. For compensatory damages for losses resulting from, humiliation, mental anguish, economic hardship, and other damages, in the amount of five hundred thousand dollars ($500,000.00);

C. For pre-judgment interest on the amount of lost earnings and other employment benefits, at the prevailing rate allowed by law;

D. For punitive damages in the amount of five million dollars ($5,000,000.00);

E. For attorneys fees in an amount to be determined at the end of this litigation;

F. For costs of this suit; and

G. For such other and further relief as the Court may deem proper.

_____

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

David Stock,
Plaintiff-Appellant

v. No. 93-1448

Universal Foods Corporation
Dennis W. Cassidy; Kenneth
Randall; Ronald C. Miller,
Defendants-Appellees

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Benson E. Legg, District Judge.
(CA-92-557-L)

Submitted: December 20, 1993

Decided: January 19, 1994

Before MURNAGHAN and WILLIAMS, Circuit Judges,
and SPROUSE, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Charles Barry Zuravin, Frank E. Trock, Columbia, Maryland, for Appellant. L. William Gawlik, HUBER & LUTCHE, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

OPINION

PER CURIAM:

David Stock appeals the district court's order granting summary judgment to Universal Foods Corporation ("Universal"), Dennis W. Cassidy, Kenneth Randall, and Ronald C. Miller in his reverse discrimination action brought pursuant to 42 U.S.C. § 1981 (1988) and 42 U.S.C. § 1985 (3) (1988). *Stock v. Universal Foods Corp.*, 817 F.Supp. 1300 (D. Md. 1993). Upon *de nova* review, we affirm.

Stock is a white male who unsuccessfully sought a position as a maintenance mechanic at Universal. Stock, a tool and dye maker, contends that he was rejected solely because of his race and that the successful applicant, Tyrone Anderson, a

black male, was selected solely because of his race.

Following a 1991 audit by the Equal Employment Opportunity Commission ("EEOC"), Universal adopted a formal affirmative action plan ("AAP"). The audit revealed violations of Executive Order 11246 and various federal fair employment statutes and regulations. Thus, Universal entered into a conciliation agreement in June 1991, under which Universal was required, among other things, to list all job openings with the Maryland State Job Service and in the newspaper.

In late August 1991, a position in Universal's Holabird Industrial Park plant became available when a day shift machinist resigned and the night shift machinist switched to the day shift. The night shift position that became available was for a general mechanic whose primary responsibility was servicing

the packaging equipment. About half of Universal's plant maintenance mechanics are "papered" machinists, and the other half are not.[2] The two previous hires into the maintenance department were not papered machinists, and neither the outgoing day nor night shift machinists were papered.

Despite the AAP requirement that all job openings be advertised and listed with the state job service, Miller, the plant's Maintenance Superintendent, asked his maintenance mechanics whether they knew anyone who would be interested in filling the new vacancy. Stock heard about the job opening from Preston Sealover, a Universal maintenance mechanic, who told Stock that Universal was looking for a journeyman machinist.

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[2] A "journeyman machinist," also called a "paper machinist," is a machinist who has completed an apprenticeship and extra course work.

Miller interviewed Stock for the position in September 1991, and told Stock that he was impressed with Stock's qualifications. However, because Miller had not followed the AAP's procedures for advertising the position, Cassidy, the General Superintendent, instructed Miller to advertise the position.

Universal listed the opening with the Maryland State Job Service and advertised the position in the local newspaper. The ad stated that Universal was seeking a machinist-mechanic with experience in plant maintenance for the third shift. Thirty-two men applied, and Miller chose the five applicants he considered most qualified for interviews. However, Miller told Stock and the maintenance workers at Universal that Stock was still the most qualified applicant.

None of the five applicants selected by Miller were minorities. Because Cassidy feared that Miller was improperly requiring more qualifications than necessary for the job, he urged Miller to reexamine the applicant pool to determine if there were qualified minority applicants. Miller reviewed the applications and interviewed Tyrone Anderson, a black male, who had vocational training from a respected school and production line equipment experience. Despite Miller's admitted personal prejudice against minorities, Miller was impressed by Anderson's qualifications and hired him.

The essence of Count I of Stock's complaint is that Anderson was not qualified for the maintenance mechanic position. Count II of the complaint alleged that the Defendants conspired to violate Stock's rights in violation of 42 U.S.C. §

1985(3) (1988). Finding that the undisputed evidence showed that Anderson was qualified, and that Stock's § 1985(3) claim failed because Stock is not a member of a class that has suffered historically pervasive discrimination, the district court granted summary judgment to all Defendant.

We review an award of summary judgment *de novo. D) v. E. I. Du Pont de Nemours Co.,* 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate where the record taken as a whole "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986). In ruling on a motion for summary judgment, a court must assess the evidence in the light most favorable to the party opposing the motion. *Charbonnages de*

France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979).

Stock's complaint first alleged that Universal refused to hire him for a job vacancy solely on the basis of his race in violation of 42 U.S.C. § 1981 (1988). Section 1981's prohibition of intentional racial discrimination includes discrimination against whites in hiring decisions. *See McDonald v. Santa Fe Trial Transp. Co.,* 427 U.S. 273, 280 (1976). A § 1981 plaintiff must prove that he is a victim of intentional race discrimination, *General Building Contractors Ass'n v. Pennsylvania,* 458 U.S. 375, 391 (1982), through evidence adequate to create an inference of an intent to discriminate. *Cooper v. Federal Reserve Bank,* 467 U.S. 867, 874 (1984).

The district court followed the Eleventh Circuit in finding that a reverse discrimination plaintiff raises an inference of racial discrimination when he proves:

(1) that he belongs to a class; (2) that he applied for and was qualified for a job; (3) that he was rejected for the job; and (4) that the job was filled by a minority group member. *See Wilson v. Bailey,* 934 F.2d 301, 304 (11th Cir. 1991).[3] The district court

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[3] The district court noted that the courts are split on whether a white plaintiff is entitled to the same inference of discrimination as a minority plaintiff when he proves a prima facie case. The Sixth, Eighth, and District of Columbia Circuits have held that a white male plaintiff who otherwise makes out a prima facie case is not entitled to an inference of discrimination, because the proof scheme set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), is premised upon this country's history of racial discrimination against minority groups, particularly blacks. *See Donaghy v. City of Omaha,* 933 F.2d 1448, 1458 (8th Cir. 1991), *cert. denied,* 60 U.S.L.W. 3498 (U.S. 1992); *Murray v. Thistledown Racing Club, Inc.,* 770 F.2d 63, 67-68 (6th Cir. 1985); *Lanphear v. Prokop,* 703 F.2d 1311, 1315 (D.C. Cir. 1983). Thus, these courts hold that a reverse discrimination plaintiff raises an inference of impermissible racial discrimination when he satisfies the *McDonnell Douglas* prima facie test *and* also presents evidence of background circumstances to support the suspicion that the defendant discriminates against the majority. *Murray,* 770 F.2d

properly found that Stock met his initial burden of raising an inference of impermissible racial discrimination. Stock offered proof that he applied for the open position, was undeniably qualified for the job, was rejected, and the job was filled by a minority applicant. Thus, the district court properly shifted the burden to Universal to enunciate a legitimate, non-discriminatory reason for its decision not to hire Stock.

The district court correctly found that Universal had met that burden by presenting evidence that the AAP was implemented in response to past discrimination following a negative audit by EEOC. *See Valentine v. Smith,* 654 F.2d 503, 510 (8th Cir.)(holding AAP bona fide if it is substantially

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at 67. We do not have to resolve this issue here because even under the less demanding Eleventh Circuit test, Stock cannot prevail.

related to its remedial purpose), *cert. denied*, 454 U.S. 1124 (1981). An AAP is substantially related to its remedial purpose if it does not trammel the rights of non-minorities, is designed to remedy past discrimination, and is temporary. *Lilly v. City of Beckley, West Virginia,* 797 F.2d 191 (4th Cir. 1986). Indeed, Stock conceded that Universal admitted that it had historically discriminated against women and other minorities, and that women and minorities were under-utilized in the craft positions. Furthermore, Universal's AAP set annual hiring goals, did not contain hiring quotas, and was of limited duration. *See Valentine,* 654 F.2d at 510. Thus, the undisputed evidence shows the AAP was bona fide.

The district court found that Anderson was qualified for the maintenance position on the night

shift, and we agree. Stock asserted that the maintenance mechanic position required a journeyman machinist or a tool and dye maker. However, the previous night mechanic was not a papered machinist, and half of the machinists in the department were not papered machinist. Perhaps more importantly, the newspaper advertisement did not specify that training as a journeyman machinist or tool and dye maker was required. Anderson possessed the requisite skills necessary for the machinist vacancy.

In support of his claim that the job opening *required* a journeyman machinist, Stock noted (1) that Preston Sealover testified at his deposition that miller told him that the job required a journeyman machinist, and (2) that after the job was advertised in the paper, Miller initially chose five papered

machinists to interview. These "facts" do not create a material dispute preventing summary judgment. We note that Sealover's testimony was inadmissible hearsay and thus, was "not suitable grist for the summary judgment mill." *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990); *see also Maryland Highways Contractors Ass'n, Inc. v. Maryland,* 933 F.2d 1246, 1251 (4th Cir.), *cert. denied,* 60 U.S.L.W. 3342 (U.S. 1991). Moreover, Miller stated under oath that being a journeyman machinist was *not* a requirement for the job and Randall, Miller's superior and the plant manager, corroborated that there was no such requirement. Therefore, the district court correctly found that the undisputed evidence showed that the job opening did not require a journeyman machinist.

Viewing the evidence in the light most favorable to Stock, we hold that the district court correctly found that Anderson was qualified for the position and that Universal acted pursuant to a bona fide AAP. Stock simply failed to present an issue of material fact to preclude summary judgment. Accordingly, we affirm that grant of summary judgment on Stock's first claim.

Stock's second claim alleged that Universal and the other Defendants conspired, in violation of 42 U.S.C. § 1985(3) (1988), to deprive him of his right to make and enforce contracts under § 1981. Stock later conceded that it is a legal impossibility for a corporation to conspire with its employees. *See Marmott v. Maryland Lumbar Co.,*807 F.2d 1180, 1184 (4th Cir. 1986), *cert. denied,* 482 U.S. 929 (1987). Thus, Stock consented to dismissal of

Universal as Defendant on that claim.

We affirm the district court's grant of summary judgment to the remaining Defendants on the § 1985(3) claim. Stock concedes that the basis of his § 1985 claim is a violation of § 1981. As we have already discussed, however, there is no § 1981 violation in this case. Thus, we affirm the district court's grant of summary judgment on the § 1985(3) claim.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decision process.

AFFIRMED